



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 7, 2015

Albert S. Yang
Deputy City Attorney
250 Hamilton Avenue
Palo Alto, CA 94301

Re: Your Request for Advice
Our File No. A-15-101

Dear Mr. Yang:

This letter responds to your request for advice on behalf of Palo Alto City Councilmember Liz Kniss and Planning Commissioner Kate Downing regarding their duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTIONS

Do Councilmember Kniss and Commissioner Downing have conflicts of interest in the following decisions:

1. To expand an existing ground floor retail requirement in the City’s California Avenue area to encompass adjacent streets;
2. Placing limits on certain types of uses (including formula retail or “chain store”), restaurants, financial institutions, hair & nail salons; and
3. Potentially revising parking required for new restaurant uses and conversions from restaurants to office uses.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

Neither Councilmember Kniss nor Commissioner Downing has a conflict of interest in the decisions in question since none of the decisions will have a foreseeable and material financial effect on the officials' interests.

FACTS

The planning commission and city council will be asked to consider the following:

- Expansion of an existing ground floor retail requirement in the city's California Avenue area to encompass adjacent streets (You noted that there are no formal applications to convert existing ground floor retail to a non-retail use in this area);
- Placing limits on certain types of uses (including formula retail or "chain stores"), restaurants, financial institutions, hair & nail salons; and
- Revising parking requirements for restaurant uses and conversions from restaurants to office uses.

Councilmember Kniss owns a multifamily residential building within 500 feet of the area being considered for these revised regulations. Commissioner Downing leases property approximately 1,000 feet from the area being considered for revised retail regulations.

On June 8, 2015, you clarified that Commissioner Downing's leasehold is for her primary residence and not property used for any business purposes. You also noted that the term of the lease is for a term of longer than 30 days. On June 12, 2015, you provided the following additional facts:

1. The existing ground floor retail requirement for the California Avenue area is distinct from the citywide retail preservation ordinance that was the subject of the *Stump* Advice Letter, A-15-060, however the proposed regulations are essentially the same.

2. Limitations on formula retail (sometimes called "chain stores") will likely focus on new businesses. However, in cases where a landowner is renting to a tenant that moves out, the existing building might be subject to the contemplated regulation. In addition, it is possible that some formula retail will be permitted under a conditional use permit process. Alternatively, there may be a cap on the number of new formula retail.

3. The revised parking requirements for restaurant uses and conversions from restaurants to office uses would most likely apply only to new conversions. You also noted that the City's parking code does not require Councilmember Kniss provide on-site parking at her multifamily residential building. You stated that there is off-street parking in the immediate vicinity of her property. In addition, since there are no restaurants (other than a Dominos pizza) within 500 feet of the councilmember's property, a parking impact is unlikely from the proposed ordinance.

ANALYSIS

Section 87100 prohibits public officials from participating in governmental decisions in which they have a financial interest. Section 87103 provides that a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:

“(a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.

“(b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

“(c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

“(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

“(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating [\$460] or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.

“For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.”

Both Councilmember Kniss and Commissioner Downing have interests in real property in the downtown area that may be impacted by the decisions in question.² Councilmember Kniss also has an interest in a business entity and sources of income by virtue of her multifamily residential building and tenants in her building.

² An interest in real property as defined in the Act includes leaseholds, but only of terms of more than a month. (Section 82033.) Month-to-month leases are not considered real property interests. (Regulation 18233.)

Foreseeability and Materiality

Neither official owns property that will be explicitly involved in the decisions as contemplated by Regulation 18701(a). Thus, the applicable foreseeability standard set forth in Regulation 18701(b) is as follows:

“A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.”

Councilmember Kniss

Tenants/Sources of Income: When a source of income who is an individual is indirectly involved in a governmental decision, the individual will be materially affected by the decision if, among other things, the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision (Regulation 18702.1(a)) or the governmental decision will materially affect a business entity or real property in which the official has a financial interest under Regulation 18702.1 or 18702.2. (Regulation 18702.1(c).) We have no facts to suggest that these decisions will foreseeably financially affect the councilmember's tenants in any respect, so our analysis ends here with regard to the tenants of the councilmember.

Business Interests: Regulation 18702.1(b) provides the test for materiality: “the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the ... the value of a privately-held business entity.” The bare adoption of the rules being considered will not likely affect the value of the councilmember's business. Future decisions on development within the confines of these decisions may have such an affect, but nothing in the facts currently suggest that the value of the councilmember's rental business will be financially affected.

Real Property: Councilmember Kniss has an interest in residential real property that is within 500 feet of existing retail establishments. The materiality standards pertinent for interests in real property are in Regulation 18702.2(a) which provides that the financial effect of a decision is material if the decision would do any of the following:

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

“(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than

commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1.

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.”

In connection with the advice request for the *Stump* Advice Letter A-15-060, you stated that the retail establishments within 500 feet of Councilmember Kniss' property include a supermarket, a Domino's Pizza, a local pharmacy, a post office, and an office building. You stated in connection with this request that there are no formal applications to convert existing ground floor retail to a non-retail use near the councilmember's property.

- *Expand an existing ground floor retail requirement.* As we advised in our prior letter under similar facts, while it is true this ordinance could prevent a change in the use the retail business in the future, the extent to which that future decision will have a financial effect on the councilmember's residence is contingent upon intervening events and is better evaluated at the time a proposal is made. You stated that there are no formal applications to convert existing ground floor retail to a non-retail use in the area of the councilmember's property. Therefore, financial effects are not foreseeable at this time.
- *Limit on formula retail.* Limitations on formula retail will likely affect only new businesses that locate near the councilmember's property. For the same reasons noted above, financial effects are not foreseeable at this time.
- *Revision of the parking requirements for restaurant uses.* The revised parking requirements for restaurant uses could theoretically affect the councilmember's property. However, there are no restaurants (other than a Dominos pizza) within 500 feet of the councilmember's property that would be subject to the new rules. Moreover, as currently contemplated, the proposal would most likely apply only to new conversions which would not be completed without numerous intervening private and public events. Therefore, a financial effect is not foreseeable.

Commissioner Downing

Real Property: The materiality standard applicable to Commissioner Downing's leasehold is set forth in Regulation 18702.2(b). The financial effect of the governmental decision is material if it will do any of the following:

“(1) Change the termination date of the lease;

“(2) Increase or decrease the potential rental value of the property;

“(3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;

“(4) Change the official's actual or legally allowable use of the real property;

“(5) Impact the official's use and enjoyment of the real property.”

The decisions in question are: (1) to expand an existing ground floor retail requirement in the City's California Avenue area to encompass adjacent streets; (2) limit certain types of uses, including formula retail (sometimes called “chain stores”), restaurants, financial institutions, hair & nail salons; and (3) revise the parking requirements for restaurant uses and conversions from restaurants to office uses.

According to your facts, Commissioner Downing leases her residence approximately 1,000 feet from the area being considered for revised retail regulations. Between the subject properties and her property are more than three large developed city blocks. Based on these facts, any financial effect on her property cannot be expected absent extraordinary circumstances, including any of the effects enumerated in Regulation 18702.2(b). Thus, the Commissioner would not have a conflict of interest.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Legal Division

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